IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. A. SLATER and BANK OF ALASKA, a Corporation, *Appellants,* *vs.* A. E. LATHROP and ALICE JOHNSON, *Appellees.*	No. 3626

Brief for Appellants

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ALASKA DISPATCH PRESS, 1010 FIRST AVE., SEATTLE

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Upon Appeal from the District Court of the Territory of Alaska, Third Division.

Brief for Appellants

STATEMENT OF THE CASE

This appeal was taken by defendants in the trial court from a judgment enjoining them from closing an alley or passageway in the town of Cordova, Alaska, which was claimed by appellees, plaintiffs below, to be a public alley by implied dedication

and also by prescription. For convenience the parties will be designated as in the trial court.

The townsite of Cordova is located upon a steep and broken hillside. First and Second Streets run north and south across the general slope of the hill, Second Street being higher up the slope. Block 7 lies between the two and is bounded on the north by C Street and on the south by B Street, each running up hill from west to east. The distance from First and Second Streets is 214 feet, comprising lots 100 feet long and an alley 14 feet wide in the middle of the block parallel to First and Second Streets. Near the middle of the block, fronting on First Street, the main business street of the town, is lot 7, owned by defendant Slater, and adjoining it on the south is lot 8, owned by defendant Bank of Alaska. Lot 25 is across the alley directly east from lot 8, faces on Second Street, and is owned by plaintiff Alice Johnson. Block 26 lies beside lot 25 on its northerly side.

Burkhart Alley was left open in 1908 by the owners of lots 7, 8, 25 and 26. It is eight feet wide excepting a narrow platform to be described later. Four feet was taken off each of the four lots, and it it runs through the middle of the four-lot area, from Second Street down hill to First. The alley

for 100 feet along lots 7 and 8 from First Street to the platted alley running east and west is level and covered by a substantial flooring; the second story of the adjacent buildings are built to the lot line at a height of twelve feet, fully covering this part of Burkhart Alley. From the rear of these buildings, which cover the whole of lots 7 and 8 to the cross alley, Burkhart Alley rises on a steep grade to Second Street. The extent or degree of this rise is not given in the record but the evidence shows that the basement of the "Burkhart Apartments," a building which covers the middle and rear of lot 25 (the Alice Johnson lot) is entered directly from Burkhart Alley, while the next story above is entered from a walk along its side running level from Second Street. This walk is about two feet wide and occupies that much of Burkhart Alley, the "Apartments" being set back four feet from the lot line, the same as the other three buildings adjoining the alley. Burkhart Alley, therefore, is six feet wide between lots 25 and 26.

Other facts which are undisputed are the following: That the city placed water hydrants opposite the ends of Burkhart Alley on each street. It maintained a light near the Second Street entrance and since 1915 maintained a light at the

entrance of the arcade or covered part of the alley. Lights were also maintained by adjacent owners or their tenants most of the time. The city council and chief of police several times required the adjacent owners to make repairs in the alley. An awning was maintained over the First Street entrance, and adjoining occupants of buildings used portions of the alley for private purposes. Owners of the four lots have been assessed for and have paid taxes on entire lots ever since the town was incorporated in 1909. It is admitted that travel through the alley has always been extensive, though the extent of the travel as compared with B and C Streets was variously estimated by witnesses. It is conceded that travel through the alley has been much less since the postoffice was moved from Second Street about 60 feet south of C Street, down to First Street.

ASSIGNMENT OF ERRORS

1

That the District Court for the Territory of Alaska, Third Division, erred in overruling defendants' objection to the following question propounded to Alice Johnson, one of the plaintiffs, called and sworn in her own behalf, and in permitting said witness to answer said question:

5

"Was the fact that Burkhart Alley was laid out and being used generally by the public one of the inducements that induced you to buy that property for $5,000.00?"

2

Said court erred in sustaining plaintiffs' objection to the following question propounded by defendant's counsel to witness Bartley Howard and in refusing to permit said witness to answer said question:

"I wish you would explain what was done and said by the members of the council—what was said by the members of the council at that time in regard to raising the assessor's assessment on lots 7 and 8, block 7, from $6,000.00 to $7,500.00?"

3

Said court erred in sustaining plaintiffs' objection to defendants' offer in evidence of certified extract from the minutes of the common council of the town of Cordova, relating to motion made by the plaintiff Lathrop, a member of the council:

"That the city clerk be instructed to intervene in behalf of the city in this case"

and in rejecting said offer. (Transcript of Testimony, p. 208.)

4

Said court erred in permitting the witness A. E. Lathrop to answer the following question and in

denying defendants' motion to strike out the witness' answer to said question:

Q. "And what condition does that leave the surface of the alley in the winter time in regard to snow?"

A. "It is impossible to get through."

5

Said court erred in finding as a fact that part of Finding No. 1, which reads as follows:

"that each of said plaintiffs are particularly damaged in a manner special and different from the damage to the general public of the town of Cordova, by the acts committed by the above named defendants and in the acts threatened to be committed by the above named defendants as hereinafter set forth."

6

Said court erred in finding as a fact that part of Finding No. 1, which reads as follows:

"That plaintiffs bring this action * * * * * for and on behalf of the general public of the said town of Cordova."

7

Said court erred in finding as a fact that part of Finding No. 3, which reads as follows:

"That if said defendants are permitted to obstruct said Burkhart Alley and to close the same

to the travel of the general public and to this plaintiff, this plaintiff will be especially damaged thereby, by causing a reduction in the rental values of said buildings and this plaintiff's income therefrom and will greatly depreciate the value of this plaintiff's said buildings and he will suffer irrevocable injury and loss."

8

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"That only entrance to her said apartments in the basement story is off Burkhart Alley and the second story by walk from Second Street."

9

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"at which time and for a great many years prior thereto, Burkhart Alley was and had been an open public way."

10

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"and was and had been continually used by the public as such."

11

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"That if said defendants are permitted to obstruct the said Burkhart Alley and to close the same to travel by the general public and to the use of this plaintiff, this plaintiff will suffer irreparable injury and loss in her property rights in said lot and building."

12

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"and the rental value of her apartments will be greatly depreciated and the value of her said lot and building will be greatly depreciated."

13

Said court erred in finding as a fact that part of Finding No. 6, which reads as follows:

"and they agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town."

14

Said court erred in finding as a fact that part of Finding No. 6, which reads as follows:

"That the owners of lot No. 7 and lot No. 26 in Block 7, gave 4 feet off the southerly side of their said lots for said alley."

15

Said court erred in finding as a fact that part of Finding No. 6, which reads as follows:

"the owners of lots Nos. 8 and 25, in block No. 7 gave 4 feet of the northerly side of their said lots for said alley."

16

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"That Burkhart Alley as herein described was originally opened up and ever since has been used and maintained.

17

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"That said Burkhart Alley was first opened up to public travel about the month of October, 1908."

18

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"and it ever since has been used by the general public as a public highway."

19

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"and ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs."

10

20

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"and ever since has * * without * * * permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs."

21

Said court erred in finding as a fact that part of Finding No. 8, which reads as follows:

"the common council of the town of Cordova has exercised rights of ownership, authority and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever."

22

Said court erred in finding as a fact that part of Finding No. 8, which reads as follows:

"that the said common council has provided for the lighting of said Burkhart Alley a good portion of said time."

23

Said court erred in finding as a fact that part of Finding No. 8, which reads as follows:

"and has supervised and required the sidewalk in said alley to be kept in good repair."

24

Said court erred in finding as a fact that pare of Finding No. 8, which reads as follows:

"and by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of organization of said municipality until the present time."

25

Said court erred in finding as a fact that part of Finding No. 9, which reads as follows:

"That at no time since Burkhart Alley was opened to the public use as hereinbefore described, have the owners of any of the four lots abutting on said alley claimed or contended that said alley was not a public highway until defendant Slater herein on the 8th day of August, 1919, and the defendant Bank of Alaska, on the 10th day of September, 1919, attempted to obstruct and close said Burkhart Alley and prevent the public and these plaintiffs from the free use and enjoyment thereof."

26

Said court erred in finding as a fact that part of Finding No. 10, which reads as follows:

"that at the time each of said defendants purchased their respective lots, said Burkhart Alley was a public highway."

27

Said court erred in finding as a fact that part of Finding No. 10, which reads as follows:

"and had been continuously used by the general public since the year 1908 as a public highway."

28

Said court erred in finding as a fact that part of Finding No. 10, which reads as follows:

"and each of said defendants had full knowledge of said fact."

29

Said court erred in finding as a fact that part of Finding No. 11, which reads as follows:

"That on the 8th day of August, 1919, defendant H. A. Slater unlawfully and without right or authority obstructed the free use and enjoyment of Burkhart Alley."

30

Said court erred in finding as a fact that part of Finding No. 11, which reads as follows:

"that each of said defendants unlawfully claimed the right to close and obstruct Burkhart Alley."

31

Said court erred in finding as a fact that part of Finding No. 12, which reads as follows:

"That if said defendants or either of them is permitted to obstruct and close said Burkhart Alley and prevent these plaintiffs and the general public

from the free use and enjoyment of said Burkhart Alley, these plaintiffs will suffer great and irreparable injury and loss in their property rights."

32

Said court erred in finding as a fact that part of Finding No. 12, which reads as follows:

"and the traveling public of the town of Cordova will suffer great inconvenience, loss and damage."

33

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"That more than ten (10) years have elapsed since said Burkhart Alley was laid out and first used as a public street, prior to the time either of these defendants first asserted or claimed the right to close said alley or any portion thereof."

34

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"and during all of said time, said Burkhart Alley was continuously and without interruption used by and in the exclusive possession of the inhabitants, residents and general public of the said town of Cordova, as a public street or alley."

35

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"with the knowledge and acquiescence at all times of the owners of all of said lots crossed by said alley and without license or permission of, hindrance or objection from, any person or persons whomsoever."

36

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"and that such use, and possession by the public of said alley as a public alley was during all of said time, adverse, hostile, continuous, exclusive and under color and claim of right."

37

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"that the common council of the town of Cordova, shortly after said Burkhart Alley was first opened to public travel and use as hereinbefore stated, accepted said alley as a public thoroughfare by lighting the same."

38

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"that the common council of the town of Cordova, * * * * accepted said alley as a public thoroughfare by * * * * keeping the same clear from all obstructions."

39

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"that the common council of the town of Cordova * * * * accepted said alley as a public thoroughfare by * * * * requiring the sidewalk in said alley to be kept in good repair."

40

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"and generally exercised supervision, control and ownership over said alley and continued to do so up to the present time."

41

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"that the travel and use of said alley by the general passing through said alley and over and upon the same, far exceeded the travel on either B or C Streets between First and Second Streets during all the time hereinbefore mentioned."

42

Said court erred in concluding and adopting that part of Conclusion of Law No. 1, which reads as follows:

"That said Burkhart Alley in the month of October, 1908, became and ever since has been and

now is a public thoroughfare or alley by reason of an implied dedication arising from the acts of the owners of lots Nos. 7 and 8 and lots Nos. 25 and 26, in block No. 7, in the town of Cordova."

43

Said court erred in concluding and adopting Conclusion of Law No. 2, which reads as follows:

"That said Burkhart Alley as described in the foregoing findings of fact, at the time when said defendants attempted to obstruct a portion of said alley, to-wit, on the 8th day of August, 1919, and on the 10th day of September, 1919, was, and ever since has been, and now is, a public thoroughfare and alley by prescription, the same having been used exclusively and continuously by the general public of the town of Cordova for a period of more than ten years prior to the said 8th day of August, 1919, under color of title and claim of right, and adverse and hostile to the owners of the respective lots over which said alley passes and with the knowledge and acquiescence of said owners but without their license or permission, and without any objections from them or any of them."

44

Said court erred in concluding and adopting that part of Conclusion of Law No. 2, which reads as follows:

"That said Burkhart Alley as described in the foregoing Findings of Fact, was at the time when said defendants attempted to obstruct and close a portion of said alley, to-wit: On the 8th day of

August, 1919, and on the 10th day of September, 1919, was, and ever since has been, and now is, a public thoroughfare and alley by prescription."

45

Said court erred in concluding and adopting Conclusion of Law No. 3, which reads as follows:

"That plaintiffs are entitled to have said Burkhart Alley as described in the foregoing Findings of Fact, maintained and kept free from obstructions and continuausly open for the free and uninterrupted travel and use by these plaintiffs and the general public of the town of Cordova, as a publi cthoroughfare or alley."

46

The court erred in concluding and adopting that part of Conclusion of Law No. 4, which reads as follows:

"That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or clasing said Burkhart Alley as described in the foregoing Findings of Fact where the same passes upon and over lots Nos. 7 and 8, in block No. 7, in said town of Cordova."

47

Said court erred in concluding and adopting Conclusion of Law No. 4, which reads as follows:

"That these plaintiffs are entitled to have said defendants and each of them enjoined from in any

manner obstructing or closing said Burkhart Alley as described in the foregoing Finding of Fact where the same passes upon and over lots Nos. 7 and 8, in block No. 7, in said town of Cordova, to-wit: An alley eight (8) feet wide, the center of which is the dividing line between lots Nos. 7 and 8, in block No. 7, and twelve (12) feet high for the entire length of lots Nos. 7 and 8, and from in any manner whatever obstructing or closing said alley or any part or portion thereof or in any manner interfering with the free use and enjoyment thereof as a public highway as the same was when first laid out and opened to public use and travel and ever since has been used and traveled by the pub' lic."

48

Said court erred in concluding and adopting Conclusion of Law No. 5, or the order contained in paragraph No. 5 of said Conclusions of Law, if same is intended as an order, which Conclusion of Law reads as follows:

"That plaintiffs have decreed against defendants and each of them in accordance with their prayer of their amended complaint and in accordance with the foregoing conclusions of law and have judgment against said defendants and each of them for the costs and disbursements incurred in this action by plaintiffs."

49

Said court erred in entering its decree and judgment in favor of the plaintiffs and against the de-

fendants on the 26th day of May, 1920, for the reason that said decree and judgment is contrary to law and is not supported by the Findings of Fact or Conclusions of Law, pleadings or evidence in this cause.

ARGUMENT

It will be observed that the Findings of Fact are very long, and counsel for defendants believe it a fair commentary upon them to say that they contain many repetitions, much needless detail and iteration; much that is an abstract of testimony rather than statement of ultimate fact; much that is argumentative; and that they indicate an intent to negative every possible construction of the evidence that would militate against any averments in plaintiffs' complaint. This made it necessary for defendants to file a long list of exceptions to the findings. Some of these, doubtless, are unimportant, and it would be useless as well as tedious to discuss them in detail. All the findings and exceptions produce in substance only one issue, in the opinion of defendants' counsel. This brief will aim to arrange the assignments of error into such groups as will tend to short and logical argument, directing attention to repetitions in the findings.

The findings as to the interests of plaintffs seem to defendants to be relatively unimportant. If Burkhart Alley is decided to be a public way the interests of plaintiffs will be fully protected. If it is a private way they have no interests which can prevail against the property rights of defendants.

The really important findings, then, are those which form the basis for the decree adjudging the alley to be a public way. Exceptions to these findings were taken and are set up in the Assignments of Error Nos. 9, 10, 13, 14 to 28 inclusive, 33 to 40 inclusive. These findings set up with much repetition, closely resembling argument and conclusions, facts found by the court. Defendants urge that these Findings of Fact are contrary to the great weight of the evidence, and that the Conclusions of Law drawn from them are wholly erroneous.

The assignments of error just noted are based on exceptions to findings that Burkhart Alley for many years had been "an open public way and had been continually used by the public as such"; that the owners of the lots "agreed among themselves to open an alley eight feet wide from First Street to Second Street in said town"; that they each gave four feet for said alley; "that Burkhart Alley

as herein described was originally opened up and ever since has been used and maintained"; "that said Burkhart Alley was first opened up to public travel about the month of October, 1908, and it ever since has been used by the general public as a public highway; and ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public."

The assignments mentioned also assign error in Finding No. 8 "that said common council has provided for the lighting of said Burkhart Alley a good portion of said time; and has supervised and required the sidewalk in said alley to be kept in good repair by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time."

Finding No. 8 also contains the following expansive statement, assigned as error in Assignment 21; "the common council of the town of Cordova has exercised rights of ownership, authority and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever."

The assertion in the foregoing finding that the town of Cordova has exercised rights of "owner-

ship" over Burkhart Alley seems to call for further definition in view of the fact that plaintiffs do not claim the public right in the alley to be anything but an easement, and the decree expressly states that the public and the plaintiffs "have a perpetual easement over and upon said alley for public travel." It is probably fair to suggest that the declaration of municipal ownership is merely the climax of the earnest effort of plaintiffs' counsel to annihilate in the findings every atom of defense. Nevertheless, it is inconsistent with the record evidence offered by plaintiffs that the town council compelled "the owners" of the alley to repair.

If it be contended that the reference to "owners" in the order for repairs in the alley designates them as owners of the fee, it is difficult to see how that helps plaintiffs' case. Plaintiffs claim Burkhart Alley is an easement over the land. If the town owns the easement it owns Burkhart Alley and should make repairs itself. The orders of the town council that the lot owners should make repairs in the alley was a direct recognition that the alley was private property and the requirement that it should be kept in safe condition was a police measure, justified by the common public use.

Defendants tried to make an exhaustive statement of the facts at the beginning of this brief it appears to them that the issues are almost wholly of fact rather than law. Plaintiffs claim an implied dedication of the alley to public use, and further, a highway by prescription. While adjudications in similar cases are somewhat conflicting defendants suggest that the contradictions in the decisions are less real than apparent because of variations in facts. Appellants are persuaded that if this brief can aid in determination of the cause it can do so most effectively by clarifying the facts, which are strikingly unusual. Exhaustive citation of authorities by counsel for all the parties in the trial court failed to produce one case very closely resembling this one.

The record seems to show that court and counsel in the district court agreed generally that an implied dedication of a public highway must be based upon such a state of facts as point clearly and definitely to the unavoidable conclusion that a dedication was intended, or that the facts are such as raise an equitable estoppel against the claimant of the land, forbidding him to assert any rights after long acquiescence in unchallenged public use; and that highway by prescription must be by pub-

lic use adverse to the private right, exclusive, continuous, uninterrupted, under color of right, and in no way permissive, or suggestive of mere license.

When the new town of Cordova began building in 1908, as already set out in the statement of the case, the owners of the four lots bordering Burkhart Alley erected their buildings four feet back from the lot line, leaving the eight-foot alley. The agreement among them is stated concisely by Robert Ashland in his deposition, and its material facts are not disputed by any witness. Ashland testified (R. 220) that he built on lot 7, M. Finklestein on lot 26, Henry Burkhart on lots 8 and 23, and that there was an agreement among them for the alley, and stated further in answer to questions:

"Well, I can't remember who was present. I know Henry Burkhart's brother was present. Then Finkelstein, Henry Burkhart and myself had a conversation. They were all present at the same time. We agreed to build this hallway with the understanding that if at any time any of us wanted to close up the hallway we had a perfect right to do so" (R. 223).

Ashland testified further that it was never the intention to make the alley a public one, and that the lot owners constructed all the planking through-

out its length, including the crossing of the platted alley (R. 225-6). In answer to a cross-interrogatory as to general public travel through the alley, he said:

"Anybody could travel through there with our permission, of course, but it could be closed up at any time" (R. 228).

Ashland strenuously denied that any agreement was made that the consent of all the property owners would be necessary to close the alley (R. 228). M. Finkelstein, who built on lot 26, closely corroborated Ashland except that he said he could not remember any particular conversation, nor with any particular person, but the understanding among the lot owners was to create the alley for their own convenience (R. 289-90-91). When asked whether the agreement was for a public alley, he answered:

"Positively not; it was not for a public alley at all, but for our own convenience, to get to our buildings more easily" (R. 291).

Finklestein further testified that the lot owners all agreed that the alley might be closed at any time. Also, that the lot owners constructed the planking, and as long as he was interested made all repairs (R. 291-292).

David McDonald, a witness for plaintiff, was asked on direct examination:

Q. "What, if anything, was said by Ashland or Burkhart, or both of them, at the time you had these conversations, as to whether Burkhart Alley was a public thoroughfare and would remain open as a public thoroughfare?"

A. "There was nothing like that" (R. 191).

Defendant Slater and Bartley Howard each testified that he had been a member of the town council several years; that property owners were required to keep sidewalks in front of their lots repaired, and this was not contradicted. (No evidence of an ordinance on the subject was introduced.) Slater testified that he had paid for repairs on the First Avenue sidewalk in front of his part of Burkhart Alley (R. 238). David McDonald, who had been a part owner of lot 7 prior to Slater, testified that he had paid for such repairs (R. 198). Bartley Howard testified that he had repaired the sidewalk on First Avenue in front of Burkhart Alley and had been paid for it by the owners, Slater and Burkhart (R. 266).

On cross-examination by Mr. Donohoe, attorney for plaintiffs, Howard testified:

Q. "I will read an extract from page 437 of Book One of the Minutes of the Town Council of Cordova,

as follows: 'It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired.' Do you remember of that action?"

A. "Yes, sir."

Q. "And do you know if the owners were instructed to repair in pursuance of that resolution?"

A. "If I am not mistaken I notified Mr. Burkhart myself at the request of the street committee —it was his sidewalk in front of the alleyway on Second Avenue that was sloping toward the street, very steep and dangerous, and I notified Mr. Burkhart the next morning to raise it up" (R. 276-7).

In this connection defendants urge the third assignment of error:

Said court erred in sustaining plaintiffs' objection to defendant's offer in evidence of certified abstract from the minutes of the common council of the town of Cordova, relating to a motion made by plaintiff Lathrop, a member of the council:

"That the city clerk be instructed to intervene in behalf of the city in this case."

and in rejecting said offer (R. 279-280).

Inasmuch as the gist of the action was the claim of plaintiffs that Burkhart alley is a public highway it appears to defendants that the attitude of the town council toward the controversy was evidence both competent and material. The court found as a fact that the town had at the time between 2,000 and 3,000 inhabitants (R. 336); as a further fact that the two plaintiffs brought the suit to protect their own private rights and for and on behalf of the general public. The only basis for this finding was the pleadings and testimony of the two plaintiffs. All the other inhabitants of Cordova, including six councilmen, perversely or stupidly slept upon their rights. It was left for the two plaintiffs to uphold the public interest with a zeal almost equal to that of the three tailors of Tuley Street, who spoke for the people of England.

In Finding 4 it is recited that the lot owners gave four feet each to form the alley, "leaving an alley eight feet wide from First Street to Second Street," and further along in the same finding it is set forth that "at the time said alley was opened the owners of lot 25 erected two high walks 20 inches wide which did not follow the grade of the alley but was on a level of the first floor of the building erected on said lot 25." These two high walks occupy a

part of the eight-foot space which the finding affirms was given to the public. The court's first conclusion of law states that "Burkhart Alley in October, 1908, became and ever since has been and now is a public thoroughfare by reason of an implied dedication arising from the acts of the owners" of the four lots.

If the lot owners gave four feet each to form the alley and a dedication resulted, the intrusion of the 20-inch walks upon the eight-foot space was a purpresture. It is true the finding proceeds to describe the subtraction from the alley of the space occupied by the high walks, but that is inconsistent with the "dedication" of the four feet "given" by the owner of that lot.

Defendants' counsel urge that these inconsistencies and contradictions in the findings and conclusions seriously impair the force of the ultimate conclusion embodied in the decree—that Burkhart Alley is a public thoroughfare. In connection with the physical facts they point strongly to the opposite conclusion—that the alley has always been a private one, such space being given up by each owner as suited his own purposes and convenience.

Assignment 23 is directed against the finding that the town council "has supervised and required

the sidewalk to be kept in good repair." Defendants will not burden this court with definitions of a sidewalk, but submit that a planking of even surface extending across a public highway is not a "sidewalk," but rather a paving. There is no evidence in the record that town ordinances of Cordova require adjacent property owners to maintain streets and alleys to the middle line. It would scarcely be contended that if the town were to plank the platted alley running transversely through block 7 the property owners would have to maintain it. Defendants again call attention to the fact that the council ordered the "owners" of Burkhart Alley to repair it (R. 101-104). They respectfully suggest that all the acts of the town council affecting the alley were but an ordinary exercise of the police power for public safety that might be exerted over private property, or were acts for public convenience by agreement with the property owners. No city would allow a pitfall to exist on a private way frequently used by the public.

As already suggested in this brief the case in some features is one of first impression. Counsel have been unable to find in the books a claim of public way presenting the same physical facts.

Possibly no nearer approximation can be found than in *City of Clatskanie v. McDonald*, 85 Or. 670, 167 P. 560. The defendant set the front of his hotel building back five feet from a road, afterwards Bridge Street in the city. Further facts are thus stated by the court:

"In front of the building he laid flooring five feet in width and roofed it over. The roof was supported by six wooden pillars, which stood out five feet from the front of the building. A door and two windows on the second floor of the hotel opened out on this roof, which was on the same level as the second floor of the hotel. In 1908 the pillars were removed, and thereafter the roof was supported by braces; at the same time defendant extended the flooring or sidewalk in front of the hotel to a width of eight feet. It is admitted that subsequent to 1906 most of the foot travel on the street has passed over this sidewalk. The defendants have continuously paid taxes on the property in dispute."

The adjoining owner on the north placed the front of her building on the same line with McDonald's. The adjoining owner on the south made his building project two feet further into the road. Suit was instituted in October, 1915, by the city of Clatskanie to determine the adverse claim of defendant to a disputed strip, claiming title by prescription, parol dedication and estoppel. It was conceded that the record title to the strip was in

defendants. The trial court entered decree for the defendants, which was affirmed by the supreme court, laying down these principles:

Where the use of a sidewalk was permissive in its origin it could not become adverse without some unequivocal assertion of the rights of the public inconsistent with the title of the record owner.

Dedication by acts in pais will not be assumed without clear evidence manifesting an unmistakable intention to abandon to the public use.

Although the levy of taxes does not estop the public from claiming property as a highway, the continuous payment of taxes is evidence rebutting the presumption of a dedication.

The title to real property cannot be divested by estoppel without clear and satisfactory evidence.

The opinion of the court cites many cases from Oregon and other states in support of its decision. It quotes from *Parrott vs. Stewart*, 65 Or. 254, 260, 132, P. 525, extracts from the opinion of Mr. Justice Bean, which extracts with the context read as follows:

"To establish a highway by prescription there must be an actual adverse public use, general, uninterrupted, continued for the period of the statute

of limitations under a claim of right. It was held in *Smith v. Gardner*, 12 Or. 226, 6 P. 771, that mere user of a highway, however long continued and uninterrupted, by the public, is not sufficient to prove a right in the public; but such user must be accompanied by acts, such as working the road, keeping it up by the public, repairing it or removing obstructions, etc., showing the use to have been under a claim of right, and not merely by permission of the landowners."

It has already been shown in the instant case that the town council ordered "the owners" of Burkhart Alley to repair it at least twice. The only evidence as to the removal of obstructions is in the testimony of George Dooley, that

"As chief of the fire department and as chief of police I made it a point to always keep that passageway clear and notified the owners that I didn't want any obstructions in the alleyway in case of fire, as I wished to go through there with the apparatus" (R. 116).

On cross-examination Dooley admitted that he gave no official order; that the adjacent property owners acceded cheerfully to his request that the alley be kept clear; and that it was no doubt regarded by them as a measure of fire protection to them and the general public (R. 120).

A case very similar to the Clatskanie case is *Morlang v. Parkersburg* (West Virginia), 100 S. E. 394. The court held that

"Where the owner of property abutting upon a city street constructs the building upon his property three and a half feet back from the street line, and paves the same in the same manner as the sidewalk is paved, and permits the public using such sidewalk to also use such paved strip between the front of his building and the street line as a sidewalk, he will not be held to have thereby dedicated the same to the public by implication, unless it be further shown that the public authorities, with his knowledge, exercise acts of dominion thereon indicative of their belief that the same has been dedicated to the public."

The opinion in the Morland case cites the Clatskanie case and others to the same effect. It is found in 7 A. L. R. 718, where it is followed by a lengthy annotation on page 727.

"The use must be adverse to the owner of the fee. The rule is correctly stated in 2 Greenleaf on Evidence. The learned author, after defining prescription and the period of possession which constituted it, and explaining the modern practice which has introduced a new kind of title, namely, the presumption of a grant, made and lost in modern times, which the jury advised or directed to find, upon evidence of enjoyment for sufficient length of time, says: 'In the United States grants have been very freely presumed, upon proof of an adverse, exclusive and uninterrupted enjoyment for twenty years.' And after stating the quality of presumption which arises, he continues: 'In order, however, that the enjoyment of an easement in another's land may be conclusive of the right, it must have been adverse, that is under a claim of title, with the knowledge and acquiescence of the

owner of the land, and uninterrupted; and the burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor. Secs. 538-9.' Under a different rule, licenses would grow into grants of the fee, and permissive occupations of land become conveyances of it. 'It would shock that sense of right.' Chief Justice Marshal said in *Kirk v. Smith* ex dem Penn., 9 Wheat. 286, 'which must be equally felt by legislators and judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title.' " *District of Columbia v. Robinson*, 180 U. S. 91-100.

The same doctrine in substance is elaborated in 37 Cyc. 28 et seq. with many citations.

A fair statement of apparently settled law is found in 18 Corpus Juris, P. 105, under the subtitle, "Public User of Private Way."

"Where the proprietor of land constructs a road over it for his own convenience, the mere user thereof by the public, by sufferance of the proprietor, no matter how long continued, will not show a dedication of the way to the public use nor vest any right in the public to the way. In applying this rule it has been uniformly held that a way constructed merely to provide convenient access to the owner's place of business, as for instance of a railroad depot, a wharf, or a store, does not become a public way from user by the public in going to and from such place of business. So also in applying the general rule it has been held that where adjoining landowners agree to reserve an alley between their

premises for their own use, the fact that the same for years is open to the public use and that in several conveyances it is described as an alley will not make it a public easement." Citing many cases.

In the same paragraph the text writer uses language almost identical with that employed in the opinion in *Parrott v. Stewart*, supra, but without citing that case, which was earliest in date:

"To establish a dedication the user must be accompanied by acts which show it to have been claimed as a right and not by permission of the owner, such as working on it, keeping it in repair, and requiring the removal of obstructions."

It appears to defendants needless to cite law or authorities at great length, since, as already suggested in this brief, practically one question is presented to this court for decision: Do the facts shown in the evidence justify the finding and judgment of the district court that Burkhart Alley is a public way? All other issues are incidental. No substantial difference in views of the law of dedication, prescription or estoppel as applied to highways can exist among lawyers. But in citing authorities and precedents it is always important to remember the observation of Mr. Justice Moody in *Home Telephone Co. v. Los Angeles*, 211 U. S. 264-274:

"It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for

another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other."

Counsel for defendants contend that the vital error of the trial court lay in drawing wrong conclusions from a few facts and ignoring the force of other facts equally weighty. We are not unmindful of the rule that appellate courts are reluctant to disturb the findings of a trial court where there is fair support for them in the evidence, but that rule is applicable where there is a conflict in the testimony. In this case there is scarcely any conflict in the testimony—none at all as to the physical facts of the public history of the alley. No material deviation was made by any witness from the statement of facts at the beginning of this brief.

Defendants, therefore, reiterate that the findings of the court except so far as they set out admitted facts, are conclusions and arguments in support of the judgment. Some of the findings, it is respectfully urged, are contradicted by the testimony of plaintiffs. The following are examples:

In Finding No. 13 (Assignment 38) it is asserted that "the common council of Cordova accepted said alley as a public thoroughfare by keeping the same clear from all obstructions." The

record is bare of evidence that the council ever did anything about obstructions. The police and fire chief notified the owners that he wanted the alley kept clear for fire apparatus.

In Finding No. 13 ,Assignment 37) it is stated that soon after the alley was opened the council accepted it "as a public thoroughfare by lighting the same." The alley was opened in 1908. A city light was first placed in it in the fall of 1912 (R. 106). Private lights were maintained in it from the beginning and for many years after the city light was put in.

Other inaccuracies have previously been noted. A striking feature of the findings is their use of terms more applicable to legal conclusions than to findings of fact. This is particularly marked in Finding No. 13, which states that the alley was used continuously and without interruption by the general public, which is admitted to be true. It then recites that the alley has been "in exclusive possession" of the public; "with the knowledge and acquiescence" of the lot owners; that such "use and possession" was at all time "adverse, hostile. continuous, exclusive and under color and claim of right." These recitals seem to embrace about all the

terms plaintiffs' counsel could find in the books that would help sweep away defendants' claims.

Defendants believe the authorities already cited in this brief, when applied to the facts of this case, cover all the law involved; that they exhibit serious errors in the findings and fatal error in the conclusions and judgment of the court. To avoid prolonging this brief counsel will merely refer to the following additional authorities supporting those already quoted from, defining the elements that constitute holdings "adverse, hostile, exclusive, continuous, and under color and claim of right."

Public use must be exclusive:

Leonard v. Detroit, 66 N. W. 488 (Mich.).

City of Atlanta v. Georgia et al, 98 S. E. 83.

Cincinnati et al. v. Cleveland et al., 123 N. E. 1 (Ind.).

Lewis v. City of Lincoln, 75 N. W. 154 (Neb.).

User by license or permission is not adverse:

Savannah v. Standard, etc., 78 S. E. 906 (Ga.).

Mitchell v. City of Denver, 78 P. 686.

B. & O. Ry. v. City of Seymour, 55 N. E. 953 (Ind.).

City of Spokane v. G. N. Ry., 158 P. 244.

Fitts v. Pierce County, 138 P. 885 (Wash.).

Presumption is that private way continues to be such:

City of Princeton v. Gustavson, 89 N. E. 653 (Ill.).

Town of Anchor v. Stewart, 110 N. E. 385 (Ill.).

Belleview Cemetery v. McEvers, 53 So. 272 (Ala.).

Sheridan County v. Patrick, 107 P. 748 (Wyo.).

Currie v. Bangor R. Co., 75 A. 51 (Me.).

Gascho v. Lennert, 97 N. E. 6 (Ind.).

Bradford v. Fultz, 149 N. W. 925 (Ia.).

Easter v. Overlea Land Co., 99 A. 893 (Md.).

Irving v. Ford, 32 N. W. 601 (Mich.).

The following federal cases touch many of the points in issue:

Coburn v. San Mateo County, 75 F. 520.

Irwin v. Dixion, 9 How. 10-30.

U. S. v. Rindge, 208 F. 611-618.

McKey v. Hyde Park Village, 134 U. S. 84.

Discussion of the law of implied dedication of highways would trespass upon the time of the court, since the principles are hardly subject to dispute. The subject is ably considered in 18 C. J., and at page 58 the rule is fairly summarized in this statement:

"A dedication is implied when the acts and conduct of the owner manifest an intention to devote the property to public use, and are inconsistent with any other theory than that he intended a dedication."

Defendants (appellants) respectfully submit that the court's Findings of Fact were so clearly against the preponderance of the evidence that the Conclusions of Law were wholly erroneous, and the judgment should be reversed.

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